No. 22,515

ited States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 899, AFL-CIO; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL UNION NO. 556, AFL-CIO; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 381; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JOINT COUNCIL OF TEAMSTERS NO. 42, AND SAN LUIS OBISPO BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Respondents.

On Petition for Enforcement of An Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 51, *et seq.*),[1] for enforce-

[1] The pertinent statutory provisions are set forth in Appendix B, *infra.*

136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*),[1] for enforcement of its order (R. 71:33)[2] issued against the respondents on July 23, 1967, and reported at 166 NLRB No. 92. This Court has jurisdiction of the proceeding under Section 10(c), the unfair labor practices having occurred at Arroyo Grande and San Luis Obispo, California.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the respondent Unions violated Section 8(b)(7)(C) of the Act by picketing the Company stores for more than thirty days without the filing of an election petition and with a proscribed recognitional objective. The evidence upon which the Board based its findings is as follows:

A. The picketing of the Company stores

State Mart, Inc., hereinafter referred to as the Company, is engaged in the operation of two retail food stores in Southern California, one in Arroyo Grande and the other in San Luis Obispo (R. 34; Tr. 67). At no time pertinent to the issues involved herein were the employees at either store represented by a labor organization (R. 35). No election has ever been held to determine the employees' choice in regard to unionism; nor has any labor organization sought to obtain such an election (*Ibid.*).

Since its opening in September of 1961, the Arroyo Grande store has been picketed by representatives of respondent Retail Clerks (R. 35; Tr. 120).[3] Originally, the pickets

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[2] References designated "R." are to Volume I of the record as reproduced pursuant to rule 10 of this Court. "Tr." references are to the reporter's transcript of testimony as reproduced in Volume II of the record. References to the General Counsel's exhibits are designated "G.C. Exh."

[3] Retail Clerks International Ass'n., Local Union No. 899.

carried signs advertising the fact that the Company had no contract with the Retail Clerks, but by June of 1963, at which time the respondent Meatcutters[4] began to take part in the picketing, the signs had been altered to indicate only that the Company failed to meet the wages and working conditions provided by organized employers in the area (R. 35; Tr. 127-128, 136). On November 2, 1965, when the San Luis Obispo store opened, the two Unions immediately established picket lines at that location and, thereafter, continued the picketing at both stores with signs reading as follows (R. 35; Tr. 74):

> This market unfair because they do not pay the prevailing wage rates or benefits paid by other markets in the area. Members of Retail Clerks Local 899 and Meatcutters Local 556, AFL-CIO, protest the substandard wage rates paid in this market. (R. 35; Tr. 96, 127-128).

Shortly after the opening of the San Luis Obispo store, the respondent Building Trades Council[5] began to take part in the picketing, displaying signs declaring that "the San Luis Obispo Building Trades Council supports the Retail Clerks and the Meatcutters Unions" (R. 35; Tr. 75, 96, 121, 127-128). Then, on January 21, 1966, the three picketing Unions were joined by respondent Teamsters Local and respondent Teamsters Joint Council,[6] whose representative on the picket line carried a sign with the following legend: "This picket line sanctioned by Teamsters Local 381 and Joint Council of Teamsters 42" (R. 35; Tr. 75, 96, 122, 127-128). Since the appearance of the Teamster picket, regular deliveries by suppliers of both stores have ceased altogether (R. 35-36; Tr. 13, 92). Consequently, the Company has been forced to use

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[4] Amalgamated Meatcutters and Butcher Workmen, Local Union No. 856.

[5] San Luis Obispo Building Trades Council.

[6] International Brotherhood of Teamsters, Local Union No. 381 and Joint Council of Teamsters No. 41.

its own trucks and labor to pick up goods directly from the various suppliers (R. 35-36; Tr. 94).

B. The Union's definition of area standards: The February 1 meeting

On January 27, 1966, about a week after the deliveries had stopped, a Company representative telephoned Kenneth Schwartz, counsel for the Retail Clerks, in order to find out what could be done to bring about the removal of the picket lines (R. 36; Tr. 13-14, 149). In response to this inquiry, Schwartz stated that the picket lines would be lifted only if the Company would adhere to the wages and working conditions prevailing in the area (*Ibid.*). Rather than pursue the matter further over the telephone, the Union and Company representatives agreed to meet at some future date for the purpose of defining the precise nature of the "area standards" (*Ibid.*).

The meeting took place on February 2, 1966, at San Luis Obispo (R. 37; Tr. 15, 151).[7] At the outset, Kenneth Schwartz, acting as spokesman for the Retail Clerks and Meatcutters, asserted that the meeting was being held solely to advise the Company "what we meant by standards in this particular area" and that the Unions did not intend either to "ask for an organization" or to "negotiate an agreement" (R. 37; Tr. 152). Then, Schwartz proceeded to set forth the Unions' definition of area standards, declaring that such standards encompassed not only wages but also "fringe benefits" and "other benefits," including health and welfare plans, pensions and vacations (R. 37; Tr. 153). The central theme of the meeting was that adherence to area standards would necessitate the payment to Company employees of "the same benefits" as were received by organized employees in the area (R. 37; Tr. 153, 17, 27). The cost of these benefits would be immaterial; the Union's only concern was with

[7] Only the respondent Retail Clerks and Meatcutters were actually represented at the meeting (R. 45; Tr. 15).

"getting these benefits for the employees and the cost was in the province of the employer" (*Ibid.*). Moreover, when wages and benefits in the area were altered, the Company would be expected to change its rates accordingly (Tr. 18-20). As Schwartz expressly asserted, "[the Company] was to maintain the standards in the area, whatever the standards would be, and for whatever time the standards were in effect" (Tr. 177).

After this general statement of the Union demands, the discussion shifted to the precise nature of various contract benefits and, at this point, the Union representatives produced copies of the area bargaining agreements (R. 37; Tr. 20, 156-158). Before actually presenting these contracts to the Company, the Unions undertook to strike out certain clauses which would not bear upon the question of area standards (R. 37-38; Tr. 158-160). In both the Retail Clerks and the Meatcutters contracts, the deleted portions related almost exclusively to Union security, hiring procedures and recognition (*Ibid.*). The portions left intact included articles concerning wage rates, fringe benefits, discharge procedures, seniority rights, working hours, overtime, grievance procedures and arbitration (*Ibid.*). When the deletion process was completed, the Unions submitted the altered documents to the Company with the representation that, except for those portions physically stricken, the contracts set forth the benefits that organized employees were receiving and that the Company must provide for its employees in order to comply with "area standards" (R. 38; Tr. 20, 41, 52). Schwartz further stated that, in presenting the contracts, he did not "want it to be construed that [he was] making any demands but [he wanted the Company] to know the type of benefits the employees enjoy under our agreement, to explain the area standards" (R. 37; Tr. 158).

The ensuing discussion of specific contract provisions centered principally on such fringe benefits as health, welfare and pensions (R. 39; Tr. 154). Under the two Union contracts, these benefits were administered through area-wide trust funds to which the individual employers contributed

(*Ibid.*). The Retail Clerks and Meatcutters trusts covered 20,000 and 10,000 employees, respectively (R. 39; Tr. 233, 180). Union representatives insisted that the Company must pay its employees the identical welfare benefits "in dollars and cents and over a period of time," as received by these represented employees [Tr. 169]. However, Schwartz made it clear that the Company would not be allowed to participate in the trust funds administered by the Unions because "the only ones who could contribute to these trusts would be signatories to the collective bargaining agreement" (R. 39; Tr. 155). Acknowledging that, without participation in those trusts "these benefits would cost [the Company] more" because of the difference in the size of the groups and might even be an "insurmountable" cost (R. 37; Tr. 17, 26, 65, 166), Schwartz disclaimed any interest in the cost of the benefits, informing the Company representatives that they "would have to work this out through [their] brokers, for health, welfare and pensions, etc" (Tr. 168-169). Union representative Schwartz also told Company representative Frame that "if his employer could give these employees these benefits at half the cost, that is his privilege" (Tr. 165). When the Company representatives inquired as to the possibility of modifying certain of the contract benefits, the Unions consistently maintained that the meeting was not a negotiating session, that none of the benefits were subject to negotiation and that the contracts spoke for themselves in regard to the definition of the benefits (R. 39; Tr. 18, 173).

At the conclusion of the meeting, the Company representatives stated that they would be unable to make an immediate decision in regard to the Union demands and picketing continued.

II. THE BOARD'S CONCLUSION AND ORDER

Upon the foregoing facts, the Board found that the respondent Unions had violated Section 8(b)(7)(C) of the Act by picketing the Company stores for more than thirty days without the filing of an election petition and with a

proscribed recognitional objective. The Board issued an order requiring all respondent Unions to cease and desist from the unfair labor practices found and to post the appropriate notices (R.71;33).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE RESPONDENT UNIONS HAD A PROSCRIBED RECOGNITIONAL OBJECTIVE AND THAT THEIR PICKETING WAS VIOLATIVE OF SECTION 8(b)(7)(C) OF THE ACT

A. Introduction: Section 8(b)(7)(C) of the Act

Section 8(b)(7), enacted as part of the 1959 amendments to the Act, constitutes a comprehensive code governing recognitional and organizational picketing. *N.L.R.B. v. Drivers, Local 639 (Curtis Bros.),* 362 U. S. 274, 291. Subsection (C) of Section 8(b)(7), which is involved herein, prohibits picketing by an uncertified union where an object thereof is "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees," if such picketing has been conducted for more than thirty days without the filing of an election petition. A proviso to this subsection exempts from the prohibition "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ a member of, or have a contract with a labor organization" unless an effect of such picketing is to induce employees of other employers not to pick up or deliver goods.

As the Board, the courts and the commentators have repeatedly pointed out, Section 8(b)(7) was enacted as a corollary to the federal policy of ensuring employees a free choice in the selection of a bargaining representative. *Dayton Typographical Union No. 57 v. N.L.R.B.,* 326 F.2d 634-637 (C.A.D.C.); *Local 542, Operating Engineers (R. S. Noonan,*

Inc.), 142 NLRB 1132, enf'd., 331 F.2d 99, 107 (C.A. 3), cert. denied, 379 U. S. 889; *Lebus v. Building and Construction Trades Council of New Orleans,* 199 F. Supp. 628, 631-632 (E. D. La.); Cox, *The Landrum-Griffin Amendments to the NLRA,* 44 Minn. L. Rev. 257, 262-266 (1959); Meltzer, *Organizational Picketing and the NLRA,* 30 U. of Chi. L. Rev. 78, 79-80, 83 (1962). Prior to the enactment of the 1959 amendments, a union could lawfully picket an unorganized employer for an unlimited length of time, either to compel the employer to recognize it as the bargaining representative of his employees or to force or require the employees to select it as their representative. Section 8(b)(7)(C) removes this threat to employee free choice by encouraging prompt resort to the Board's election machinery, rather than the economic pressures of picketing, as the method for resolving questions of representation.

In the case at bar, neither the respondent Retail Clerks nor respondent Meatcutters has ever been certified as a representative of the Company employees and it is undisputed that the picketing has been carried on for more than thirty days without the filing of an election petition. Furthermore, since deliveries to both Company stores were all but totally stopped as a direct result of the picketing, no claim is made that the proviso to Section 8(b)(7)(C) has any applicability (R. 36; Tr. 13, 92). See *Barker Bros. Corp. v. N.L.R.B.,* 328 F.2d 431 (C.A. 9); *N.L.R.B. v. Local 542, Operating Engineers,* 331 F.2d 99 (C.A. 3). Thus, the sole issue before

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[8] The Board had held that recognitional picketing by a minority union was a Section 8(b) (1) violation, arguing that such picketing interfered with the employees' Section 7 rights to refrain from union activities. However, this argument was rejected by the Supreme Court. *N.L.R.B. v. Drivers, Local 639, supra.* Consequently, the only restriction on recognitional picketing was embodied in Section 8(b)(4)(C), which prohibited picketing for an object of recognition where a union was already certified as the bargaining representative of the employees. This provision had no application where employees were unrepresented or where a union was recognized without a Board election and hence not certified.

the Court is whether the Board properly found that the respondent Unions had a recognitional objective when it picketed the Company's stores.

B. Respondents' object was recognitional and not limited to preservation of area standards

1. Introduction

When a union pickets an employer for the sole purpose of compelling compliance with prevailing area wage and benefit standards, the Board regards the picketing activity — so-called "area standards" picketing — as non-recognitional and outside the prohibition of Section 8(b)(7). See, *e.g., Houston Building and Construction Trades Council (Claude Everett Construction Co.),* 136 NLRB 321; *Local Union 71, Plumbers Union (Keith Riggs Plumbing and Heating Contractor),* 137 NLRB 1125; *Local 107, Hod Carriers Union (Texarkana Construction Co.),* 138 NLRB 102. In the instant case, the respondent Unions have consistently described their picketing as motivated solely by such a permissible area standards object. Undeniably, the formal declarations of Union representatives and the legends of the picket signs were entirely consistent with this purported objective. Moreover, no direct demands for representative status were ever made and, in fact, on several occasions, the Unions expressly disclaimed all recognitional ambitions.

However, in determining whether a union has picketed for a proscribed object, the Board is not bound by a union's self-serving description of its own objective. *N.L.R.B. v. Local 182, International Brotherhood of Teamsters,* 314 F.2d 53, 58 (C.A. 2); *Penello v. Retail Store Employees, Local 692,* 188 F. Supp. 192, 201 (D. Md.). When actual conduct beflects an underlying or accompanying recognitional object, the Board discounts claims that the union is engaged solely in area standards picketing. *Centralia Building and Construction Trades Council v. N.L.R.B.,* 363 F.2d 699 (C.A.D.C.); *N.L.R.B. v. Carpenters, Local 2133,* 356 F.2d 464, 465-466 (C.A. 9); *N.L.R.B. v. Building and Construction Trades Council of Philadelphia,* 359 F.2d 62, 63 (C.A. 3); *Operative Plasterers*

Union, Local 44 (Penny Construction Co.), 144 NLRB 1298.[9] We show below that the demands set forth by the Unions as pre-conditions to removal of the picket lines, although couched in terms of area standards, went well beyond a legitimate union concern for maintaining area standards and were tantamount to a request for recognition.

2. Respondents exceeded the limited objective of true area standards picketing

Under Section 8(b)(4)(C), which preceded Section 8(b)(7) as a legislative limitation on recognitional picketing, see, *supra*, p. 8, n. 8, the Board took the position that any picketing in support of demands that could be made through the process of collective bargaining amounted to picketing for recognition. See *Hod Carriers, Local 741 (Calumet Contractors Ass'n),* 130 NLRB 78, 81-82; *Hod Carriers Union, Local 840 (C.A. Blinne Construction Co.),* 135 NLRB 1153, 1165, n. 29; *Lewis Food Co.,* 115 NLRB 890. Applying this doctrine, the Board consistently held area standards picketing to be violative of the Act. *Petrie's,* 108 NLRB 1318; *Francis Plating Co.,* 109 NLRB 35; *Carter Mfg. Co.,* 120 NLRB 1609; *District Lodge No. 24, International Ass'n of Machinists,* 121 NLRB 1298.

Upon reconsideration of this position, however, the Board reversed its previous position and held that picketing "to conform standards of employment to those prevailing in the area is not tantamount to, nor does it have an object of recognition or bargaining." *Calumet Contractors Association,* 133 NLRB 512. The Board reasoned that (133 NLRB at 512-513):

[9] In order to establish a violation of Section 8(b)(7), it is not necessary that recognition be the sole object of the picketing; it is sufficient if an object is recognition. *Smitley* v. *N.L.R.B.,* 327 F.2d 351 (C.A. 9); *N.L.R.B.* v. *Building and Construction Trades Council of Phila., supra,* at 63; *Dayton Typographical Union No. 57* v. *N.L.R.B.,* 326 F.2d 634 (C.A.D.C.).

> A union may legitimately be concerned that a particular employer is undermining area standards of employment by maintaining lower standards. It may be willing to forego recognition and bargaining provided subnormal conditions are eliminated from area considerations . . . . As this object may be achieved without the employer either bargaining with or recognizing the [Union], we cannot reasonably conclude that [the union's] object was to obtain recognition.[10]

Subsequently, when the same issue arose under the 1959 amendments, the Board applied the *Calumet* rationale where area standards picketing was alleged to be in violation of Section 8(b)(7). *Houston Building and Construction Trades Council (Claude Everett Construction Co.),* 136 NLRB 321. In *Local 741, Plumbers Union (Keith Riggs Plumbing),* 137 NLRB 1125, 1126, the Board further explicated the limited, non-recognitional objective of area standards picketing:

> A labor union normally seeks to organize the unorganized and to negotiate collective bargaining contracts; but, it also has a legitimate interest apart from recognition and bargaining that employers meet prevailing pay scales and employee benefits, for otherwise employers paying less than the prevailing wage scales could ultimately undermine area standards.

In short, the non-recognitional concern underlying area standards picketing is the fear that unorganized employers, operating with lower labor costs, will undersell unionized competitors, thereby forcing the organized employers to

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[10] The second *Calumet* opinion was one of a series of decisions in which the Board overruled its earlier view of area standards picketing and held, in effect, that a union might lawfully picket for objects normally achieved through collective bargaining, if the immediate object of the picketing was not recognition. See *Fanelli Ford Sales, Inc.,* 133 NLRB 1468; *Mission Valley Inn,* 140 NLRB 433; *Hod Carriers Local 840 (Blinne Construction Co.),* 135 NLRB 1153.

press the union for a downward modification of the negotiated contract rates. In *Calumet* and in the succeeding decisions under Section 8(b)(7), the Board recognized this "legitimate interest apart from recognition and bargaining." *Keith Riggs Plumbing Co., supra,* at 1125-1126, and excepted area standards picketing from the prohibition of Section 8(b)(7).

However, since the threat to union standards is created by unorganized employers who pay less for labor, true area standards picketing seeks only the elimination of this condition. So long as the unorganized employer's labor costs equal those of his organized competitor, there is no danger that union standards will be undermined. We show below that respondents' demands were not limited to the elimination of differences in labor costs and thus did not directly relate to the preservation of economic gains already achieved for its members.[11]

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[11] We anticipate that respondents will renew the contention that the Board has previously held that picketing aimed at requiring unorganized employers to adopt the specific benefits contained in area contracts was permissible area standards picketing. The argument was based upon language taken out of context from the *Keith Riggs* decision. Thus, although respondents relied upon so much of that opinion as stated that a labor organization has "a legitimate interest apart from recognition or bargaining that employers meet prevailing wage scales and employee benefits," 137 NLRB at 1126, they overlooked the next clause of the very same sentence — "for otherwise employers paying less than the prevailing wage scales could ultimately undermine area standards." *Ibid.* The Board clearly indicated that the distinctly non-recognitional objective involved was preventing the undermining of existing union standards.

The commentators have recognized a distinction between area standards picketing and recognitional picketing and have consistently characterized area standards picketing as purely defensive. Professors Cox and Aaron would allow such picketing only where the union can affirmatively prove that "the labor standards of which [it] complains are *such a substantial threat to existing standards* as to support a finding that the union has a genuine interest in compelling

(Continued)

It is undisputed that respondent Unions demanded, as a precondition to removal of the picket lines, that the Company provide for its employees "the same" wages and fringe benefits, including identical health, welfare and pension plans, as were embodied in the area bargaining contracts (R. 37; Tr. 17, 27, 153). They were admittedly not concerned solely with the cost to the Company of providing the required benefits and would not have lifted the picket lines in return for a promise to meet the labor costs of the companies organized by respondents.[12] On the contrary, the Unions sought, not simply to raise Company costs to Union scale, but also to dictate the manner in which labor costs would be distributed to Company employees. Thus, the Unions sought to establish specific wage rates, and specific health, welfare and pension plans with fixed amounts which the employees would receive under each of the plans.

Such control over the terms and conditions of employment of unorganized employees was clearly beyond respondents' area standards interest. Once the Company's competitive advantage had been eliminated and the rights of currently organized employees thereby secured, the Union's further demands were focused solely upon the interests of the Company employees. In effect, the Unions were seeking to gain a specific allocation of benefits for employees who had not designated them as bargaining representative. The Company's employees might well have preferred that an economic package designed to impose equal costs on the Company be distributed wholly in the form of increased wages. But, in any

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(Continued from preceding page)

the improvement of labor conditions or eliminating the competition" (emphasis supplied). Cox, *supra,* at 267; Aaron, *The LMRDA of 1959,* 73 Harv. L. Rev. 1086, 1104-1105 (1960). See also, Weis, *The Unlawful Object in Section 8(b)(7) Picketing,* 13 Lab. L. J. 787, 794 (1962); Comment, *Picketing by an Uncertified Union,* 69 Yale L. J. 1393, 1399-1400 (1960); Dunau, *Some Aspects of the Current Interpretation of Section 8(b)(7)* 52 Geo. L. J. 220, 227-230 (1964).

[12] Indeed, as noted in the Statement, *supra,* p. 6, Union representative Schwartz went so far as to say that respondents did not care whether the Company could provide the same benefits at less cost — an admission difficult to reconcile with an area standards objective.

event, this was a decision that should be made by the Company and its employees themselves, in the absence of a freely elected bargaining agent. When the respondents demanded the right to make this decision, they were, *pro tanto*, demanding recognition. Since the Unions picketed in support of their demands, the Board correctly found that the picketing was for the object regulated by Section 8(b)(7).[13]

Meat and Highway Drivers, Local 710 v. N.L.R.B., 335 F.2d 709 (C.A.D.C.), which involved the application of Section 8(e) of the Act, provides substantial support for the Board's conclusion.[14] There, the Court considered the legality of a clause in a collective bargaining agreement which provided that the employer could subcontract delivery work only to cartage companies "whose truck drivers enjoy the same or greater wages and other benefits as provided in this agreement for making of such deliveries." *Ibid.*, at 715.

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[13] The fact the Unions did not seek to obtain a written contract, binding the Company to a long-term relationship, does not detract from the finding of a recognitional object. "The statute refers to bargaining — not to bargaining for any period of time." *National Packing Co. v. N.L.R.B.*, 377 F.2d 800, 803-804 (C.A. 10). Similarly, it is of no importance that the Unions did not attempt to negotiate an overall bargaining contract. Union demands need not cover the whole range of bargaining subjects in order to amount to recognition. *Dallas Bldg. & Constr. Trades Council v. N.L.R.B.*, ___ F.2d ___ (C.A.D.C.), No. 21,057, decided April 23, 1968, 68 LRRM 2019, ___; *National Packing Co. v. N.L.R.B., supra*, at 804; *Centralia Building and Construction Trades Council v. N.L.R.B.*, 363 F.2d 699, 701 (C.A.D.C.).

[14] Section 8(e) provides, in relevant part: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . whereby such employer . . . agrees . . . to cease doing business with any other person."

Generally speaking, the Section is applicable where a contract clause is aimed at affecting the labor relations of another employer but not applicable where the aim is to protect the work of the employees of the contracting employer. See *Nat'l Woodwork Mfrs. Ass'n v. N.L.R.B.*, 386 U. S. 612.

Initially, the Court noted the general rule that subcontracting clauses are valid if they require only that subcontractors maintain union standards, but invalid if they require that subcontractors be signatories to union contracts. *Ibid.*, at 715, n. 16. While clauses in the former category merely protect the negotiated conditions of employment of the primary employer, by eliminating the incentive to contracting out bargaining unit work to subcontractors with lower labor costs, clauses of the latter type seek to impose unionism on unorganized employers and employees. Concluding that the clause before it fell in the former category, the Court upheld the validity of the contract. However, in doing so, the Court added the following qualification (*Id.*, at 715, m.1S):

> We take it that the phrase 'same or greater wages and benefits' in the [contract clause] requires only that the total cost to the employer be the same or greater. Thus, the temptation of cheap labor is removed without requiring details identical with the Union contracts.

Here, although we are not concerned with Section 8(e), the analysis is similar. Had respondents limited their demands to requiring that "the total cost" of labor to State Mart "be the same or greater" than the cost to unionized competitors, it could reasonably be said that respondents were concerned only with removing the threat to union standards by eliminating "the temptation of cheap labor." However, by "requiring details identical with the union contracts," respondents betrayed what can only be classified as a recognitional object.

3. The conduct of the Union representatives reveals a recognitional object

We submit that where a union is not content with equalizing labor costs but requires adoption of details identical with union contracts, a recognitional objective is established, and no further showing need be made. However, in the instant

case respondents' conduct at the February 1 meeting further buttresses the Board's conclusion that they sought recognition.

At this meeting, Union representatives repeatedly asserted that the sole aim of the picketing was to enforce compliance with area standards and that these area standards were embodied in the union bargaining contracts. Then, when the contracts were presented to the Company's representatives, ostensibly to familiarize them with "the area standards" (R. 37; Tr. 153, 158), virtually the only items which the Unions struck out as inapplicable were clauses relating to recognition and union security. Left intact were detailed contract provisions concerning arbitration, grievance procedures, discharge, hours, overtime, seniority, and other non-cost items ordinarily associated with an established collective bargaining relationship. While the chief Union spokesman now testifies that he was not attempting to strike out all clauses which were not to be applicable to the Company, this fact was not communicated at the meeting and, indeed, no affirmative effort was ever made to make it clear to the Company that adherence to them was not required as the price for removing the pickets. The Unions' insistence that the Company assent to such contract provisions as arbitration and seniority cannot be ~~reconcile~~ reconciled with its declared area standards objective. These non-cost items do not contribute to the unorganized employer's competitive advantage and cannot be deemed to pose a threat to already existing standards. Accordingly, the thrust of the Union demands went beyond protection of area standards and, in fact, amounted to a request that the respondents assume the role of bargaining representative for the Company employees (albeit, the bargaining would be done with other employers) in regard to virtually all terms and conditions of employment.

The Unions' position in regard to the industry-wide trust funds presents an additional indication of the recognitional object underlying the picketing activities. At the February 1 meeting, the Union representatives admitted that, without access to the trust funds, the burden of providing equivalent benefits for the considerably smaller

Company group would be much higher.[15] Yet, the Unions still demanded that the Company provide such equivalent benefits, while simultaneously declaring that only signatories to union contracts could take part in the trust fund program. Obviously, a demand of this type, which places a greater cost burden on the unorganized employer than is borne by organized employers, cannot be justified as protection of area standards. Furthermore, when a union knowingly puts forth a demand which, although unrelated to labor costs, will create real economic hardship for the employer, making it clear that the hardship can be effectively alleviated only by signing a Union contract, the reasonable inference is that disclaimers of recognitional intent are no more than attempts to mask the true object of attaining representative status.[16]

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[15] Company representatives testified that the Union representatives present at the meeting conceded that the cost would be "astronomical" and "insurmountable" (R.37; Tr. 17, 26). The Union representatives denied using these words, but admitted knowledge that the cost to the Company would be greater (Tr. 166). This difference in testimony is irrelevant for present purposes.

[16] As Professor Cox has pointed out, Section 8(b)(7) should not apply to picketing which seeks "to prevent the distribution of the low cost, non-union goods in direct competition with the products of union labor." Cox, *supra,* 44 Minn. L. Rev. at 266. However, he recognizes the danger in this limited exclusion (*Id.,* at 267):

> "The union's objective of eliminating the competition based upon differences in labor standards can be accomplished without interfering with the [employees'] decision concerning union representation. The danger in distinguishing picketing to protest substandard wages or working conditions from picketing for union recognition or organization is that it may encourage verbal evasions through disingenuous phrasing of the pickets' placards and the union's demands."

C. The Board's order was properly directed against all respondent Unions

The demands discussed above were put forth solely by the Meatcutters and Retail Clerks. However, the other respondent Unions, by placing their representatives on the picket line, put their full weight behind those demands and, in effect, became parties to a joint venture aimed at accomplishing the objectives of the two active Unions. *N.L.R.B. v. District Council of Carpenters,* 387 F. 2d 170 (C.A. 2), *Retail Clerks, Local 324 (Barker Bros. Corp.),* 138 NLRB 478, 485-486, enf'd, 328 F.2d 431 (C.A. 9); *Shore v. Building Trades Council of Pitts.,* 173 F.2d 678, 682 (C.A. 3); *Cf. Schauffler v. Highway Truckdriver and Helpers, Local 107,* 230 F.2d 7, 10-11 (C.A. 2). As these objectives were recognitional in nature, respondents Teamsters Local, Teamsters Joint Council and Building Trades Council must be held to have violated Section 8(b)(7)(C). Indeed, since the serious injury to the Company stores — the stoppage of deliveries — did not even begin until the respondent Teamsters Local and Teamsters Joint Council appeared on the picket line, an order which issued only against the Meatcutters and Retail Clerks would be futile, leaving the other Unions free to continue effective picketing in support of the recognitional objectives of the Meatcutters and the Retail Clerks.

CONCLUSION

For the reasons stated, the Board's order should be enforced in full.

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May, 1968

CERTIFICATE OF SERVICE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

APPENDIX A

Pursuant to rule 18(2)(F) of the Rules of this Court:

Exhibits in the instant case. (Page references are to the numbered pages of the transcript).

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1(a) through 1(j)	6-7	6-7	7
2 and 3	21	23	24
4	23	23	24
5	113-114	115	115
6	139	140	141
7	139	142	142
8	139	143	143

RESPONDENT RETAIL CLERKS' EXHIBITS

No.	Identified	Offered	Received in Evidence
1 and 2	30	58	58

RESPONDENT MEATCUTTERS' EXHIBITS

No.	Identified	Offered	Received in Evidence
1	219	221	222

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents –

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: . . . (C) where such picketing has been conducted without a petition under section 9(c)

being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: . . . *Provided Further,* that nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumer) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this Section 8(b).